

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

GARY L. SCARBERRY, #154496	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION 05-0516-CG-C
DR. ROBERT BARNES, et al.,	:	
Defendants.	:	

ORDER

This matter is before the court on the report and recommendation of the magistrate judge (Doc. 22) and plaintiff's motion for dismissal without prejudice (Doc. 24). The magistrate judge recommended that defendant's motion for summary judgment be granted and that the action be dismissed with prejudice. Plaintiff filed no objection, but instead moved to dismiss his case without prejudice. (Doc. 24).

Pursuant to Rule 41, there are two methods by which an action may be voluntarily dismissed by the plaintiff without order of the court:

- (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or
- (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

FED. R. CIV. P. 41(a)(1). In this case, defendants have answered the complaint and defendants' special report was converted to a motion for summary judgment. Thus, plaintiff cannot voluntarily dismiss his complaint through subpart (i) of Rule 41. Nor, does plaintiff's motion to dismiss comply with subpart (ii) since all parties have not joined in the motion. Unless the

above requirements are met, “an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper.” FED. R. CIV. P. 41(a)(2). The court does not deem it proper to allow plaintiff to dismiss his case without prejudice after learning that the Magistrate Judge has recommended that the case be dismissed with prejudice. Therefore, plaintiff’s motion to dismiss without prejudice (Doc. 24) is **DENIED**.

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and there having been no objection filed, the Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is **ADOPTED** as the opinion of this Court. Accordingly, it is hereby **ORDERED** that summary judgment is **GRANTED** in favor of defendants.

DONE and ORDERED this 18th day of August, 2006.

/s/ Callie V. S. Granade
CHIEF UNITED STATES DISTRICT JUDGE